4. The court below was clearly in error in holding that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of unused space not devoted to transportation of the mails. Cf. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586. The court's statement that it was not making its own determination of fair and reasonable rates but was merely correcting the Commission's error of law and applying the proper rule of law to the Commission's findings erroneously assumes that the Commission had adopted Plan 2 as the proper method of determining mail cost and investment (R. 43, 44, 49). But the Commission had clearly rejected Plan 2, because of the presence of other factors, as the basis for determining mail costs and reasonable rates.

In its first report on reexamination of respondents' mail rates in 1933, the Commission pointed out that the cost formula which it had used in fixing the original rates was not "an accurate ascertainment of the actual cost of service," but was merely "an approximation to be given such weight as seems proper in view of all the circumstances" (192 I. C. C. 779, 783).[5] Even prior to its order with respect to respondents' application, the Commission had clearly recognized that the results obtained

[5] It is not even clear that the rates fixed in the original general mail pay order were based on a mathematical translation of the cost formula. 56 I. C. C. 1.

under the cost allocation formula were more theoretical than actual in its general mail pay order of July 10, 1928 (144 I. C. C. 675). This report not only discussed the inadequacies of this method of cost determination (144 I. C. C. 675, 691–692) but clearly rejected it as a single criterion for determining compensation. Although application of the formula indicated a rate increase of 25 per cent (144 I. C. C. at 688), an increase of only 15 per cent was allowed. 144 I. C. C. at 695.

The rejection of the Plan 2 formula in the instant case was made crystal clear when the Commission pointed out, on the rehearing of the application for reexamination, that it had consistently in its mail pay proceedings (citing references) given consideration to factors other than the hypothetical cost obtained by application of the space-study method; such as the amount and character of a railroad's unused space; the actual space occupied by mail as distinguished from authorized space; comparisons of compensation received from mail service with compensation received from other services in passenger-train cars; comparisons with freight rates; comparisons of the computed cost of mail service and revenue with the computed cost of corresponding units in passenger-train service as a whole; and the character of the service performed in connection with transporting the mail. 214 I. C. C. at 69–70. The lower court's computation of rates on the Plan 2 formula was, therefore, not an application of the law to the findings of the

Commission. The Commission had found that the Plan 2 formula was inapplicable. Its use by the court below was simply an independent judgment that a particular formula properly measured fair and reasonable rates despite a contrary view expressed by the Commission.

Many of the factors referred to by the Commission as undermining the validity of the Plan 2 cost formula were present in the instant case. The cost figures were unfairly weighted against the mail traffic, for space in the baggage car was allocated to mail traffic on the basis of the total space authorized, although the mail traffic actually used considerably less than the authorized space. 192 I. C. C. 782, 783; 214 I. C. C. 66, 73. Excessive amounts of unused space also mitigated against complete dependence on the cost formula. Although a 15-foot apartment was authorized, respondents at times furnished a 30-foot apartment for their own convenience and a portion of the additional 15 feet of unused space was allocated to the mail traffic. Forty-four per cent of the total car space moved was unused and a substantial proportion of this unused space was allocated under the cost study method to the mail traffic. 214 I. C. C. 66–72. If no part of the extra 15 feet of the 30-foot apartment were allocated to mail traffic, the reduction in expense charged to the mail traffic would have resulted in a computed profit. 214 I. C. C. 66, 71.

The Commission further pointed out that, based on space units which included proportionate amounts of unused space, "the mail service pays considerably more for equivalent units of service than passenger proper, or express. * * * Upon a computed unit-of-service basis, the amount paid by the department for carrying mail was about two and one-half times as much as the amount received by applicant from carrying express and about six times as much as the amount received for passenger service proper". (214 I. C. C. 66, 74). Furthermore, comparison of the cost of operating the space actually authorized for mail, omitting allocated unused space, with the rate paid for this space, permitted a generous return on investment. 214 I. C. C. at 75. It is also significant that receipts from mail traffic—approximately $250,000 for the period 1931–1938—constituted net additions to its revenue (R. 35, 116, 129). Neither the 15-foot apartment service nor the closed-pouch service furnished by respondents required them to incur any significant costs which they would not have incurred even if they had carried no mail whatever (R. 35, 116). In these circumstances, mechanical application of the cost allocation formula without regard to the invalidating factors, achieves a wholly arbitrary result.[*]

[*] See the dissent of Commissioner Eastman from the 1928 general increase order, which attacks the cost allocation formula adopted by the court below as unsatisfactory regardless of any special circumstances. 144 I. C. C. 675, 725–727.

For a recent discussion of the unreliability of cost allocation formulas see *United States* v. *Fehn & Co.*, 334 U. S. 624.

Under the lower court's decision, as previously indicated, the Government will be charged with paying double compensation for space which it does not use. Wholly apart from the question whether the Commission has the authority to disregard some or all of this authorized but unused space in fixing rates, it is clear that it is not legally permissible to increase the cost to the Government through the use of oversized equipment. The statute provides that "the Postmaster General may accept cars and apartments of greater length than those of the standards requested, but no compensation shall be allowed for such excess lengths." 39 U. S. C. 532. The legislative background indicates that the provision was intended to free the Government from additional costs imposed upon it through the use of oversized equipment. Senate Hearings on H. R. 10484, 64th Cong., 1st sess., p. 9; 51 Cong. Rec. 13405; H. Doc. 1155, 63d Cong., 2d sess., p. 100; Preliminary Report and Hearings of the Joint Committee on Postage on Second-Class Mail Matter and Compensation

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[7] Tabulations made by the Office of Railway Mail Adjustments of the Post Office Department disclose that a total of 9,069,053 sixty-foot car miles of unused space were operated by mail-carrying railroads during the year 1946 as a result of the use of oversized post-office cars and apartments. An additional 4,638,950 sixty-foot car miles of unused space were operated as a result of the use of oversized storage cars.

for the Transportation of Mail, January 24, 1913, to April 3, 1914, pp. 861–883. In addition, several decisions of this Court suggest that fair and reasonable rates are not required to include compensation for unused capacity which is not devoted to the service to the customer. *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439; *Public Service Commission* v. *Utilities Co.*, 289 U. S. 130, 135; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 590; cf. *Atchison, T. & S. F. Ry.* v. *United States*, 225 U. S. 640. Whether or not it is permissible to include the cost of operating unused space in mail rates, it seems clear error for a reviewing court to make the inclusion of such cost mandatory.

CONCLUSION

The effect of the decision below is to render uncertain the status of the Interstate Commerce Commission's mail pay rate orders, the procedure for their review and the proper scope of review. For these reasons and because the decision of the court below appears clearly wrong, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1948.

APPENDIX

The following sections of Title 39 in the U. S. Code are sections of the so-called "Railway Mail Pay Act" (Act of July 28, 1916, 39 Stat. 412, 425–431):

§ 524. Conditions of railway service; adjustment of compensation.

The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

§ 525. Classes of routes enumerated.

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

* * * * * *

§ 527. Apartment railway post-office car service.

Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for,

namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

* * * * * *

§ 530. Closed-pouch service.

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

§ 531. Rates of payment for classes of routes.

The rates of payment for the services authorized in accordance with sections 524–541, 542–568 of this title shall be as follows, namely:

* * * * *

(*b*) *Apartment railway post-office car service.*

For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

* * * * *

(*d*) *Closed-pouch service.*

For closed-pouch service, at not exceeding 1½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized

* * * * *

§ 541. Transportation required in manner, under conditions, and with service prescribed by Postmaster General; compensation therefor.

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

§ 542. Interstate Commerce Commission to fix and determine rates and compensation.

The Interstate Commerce Commission is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

§ 543. Relation between the railroads as public-service corporations and the Government to be considered.

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

* * * * * *

§ 547. Notice by Interstate Commerce Commission to railroads; answer of railroads; hearings.

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service; and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as provided by law for other hearings between carriers and shippers or associations.

* * * * * *

§ 549. Classification of carriers by Interstate Commerce Commission.

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

* * * * * *

§ 553. Applications for reexaminations.

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

§ 554. Powers conferred on Interstate Commerce Commission.

For the purposes of sections 524–541, 542–568 of this title the Interstate Commerce Commission is vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment

of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

* * * * *

§ 557. Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail matter at such rates fixed by the Postmaster General.

* * * * *

§ 563. Refusal to perform service at rates or methods of compensation provided by law.

It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined $1,000. Each day of refusal shall constitute a separate offense.

* * * * *

§ 565. Special contracts for transportation; reports of.

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions

warrant the application of higher rates than those specified in sections 524–541, 542–568 of this title.

The following provisions of Title 28, U. S. C., re also relevant:

§ 41. The district courts shall have original jurisdiction as follows:

* * * * *

(6) *Suits under postal laws.*

Sixth. Of all cases arising under the postal laws.

* * * * *

(28) *Setting aside order of Interstate Commerce Commission.*

Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * *

§ 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States.

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole, or in part the operation of the commission's order pending the final hearing and determination of the suit.